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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RALPH NADER, *et al.*,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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The fundamental teaching of *Florida Power & Light* is that jurisdictional provisions in statutes governing review of decisions by administrative agencies are to be interpreted both to avoid bifurcation and to provide for jurisdiction in the courts of appeals, whenever possible. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 742-43 (1985). Nonetheless, the Solicitor General has interpreted the two jurisdictional provisions at issue here in a manner that is at odds with *Florida Power & Light*. Unless this Court grants review, there will continue to be considerable confusion in the lower courts concerning jurisdiction over citizen suits involving the regulation of pesticides.[1]

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[1]The two sections at issue here are sections 408 and 409 of the Food, Drug and Cosmetic Act ("FDC Act"). 21 U.S.C. §§ 346a, 348. They apply to different uses of pesticides and contain different standards under which the agency regulates pesticides. Section 408 applies to pesticides used in raw agricultural products (such as apples), and section 409 applies to pesticides

1. As to the Alar tolerances issued under section 408 for uses on raw agricultural products, the Solicitor General concedes that petitioners' argument — that the Environmental Protection Agency's denial of the citizen petition is an "order" which is reviewable in the court of appeals — is "not insubstantial." Opposition at 13. It would have been difficult for the Solicitor General to have argued otherwise since he also agrees that the same denial of the same petition is an "order" that is reviewable in the court of appeals under section 409, when that pesticide is found in processed foods. *Id.* at 18.

Under *Florida Power & Light*, the fact that there is a "not insubstantial" argument that section 408 can be interpreted to permit review in the court of appeals is sufficient to place review in that court. As then-Judge Kennedy concluded in *Public Utility Commissioner v. Bonneville Power Administration*, 767 F.2d 622, 627 (9th Cir. 1985), *Florida Power & Light* expressed a "strong preference for reviewing all preliminary or ancillary issues in a proceeding in the forum provided for the final agency order or action." The parties, including EPA, agree that review of a final regulation establishing or revoking a section 408 tolerance for a pesticide must be in the court of appeals. *See* Opposition at 4, 13. Therefore, *Florida Power & Light* requires that review of the denial of a citizen petition seeking revocation of such an order must also be in that court.[2]

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used in processed foods (such as tomato paste), as well as to other substances classified as "food additives." In our opening brief, we referred to these provisions by their U.S. Code section, but in this brief we will follow the citation form used by the Solicitor General and refer to the provisions as "section 408" and "section 409."

[2]The parties disagree on whether a citizen seeking review of a section 408 regulation (as opposed to the denial of a citizens' petition, which is at issue here) must file objections with the EPA before seeking review in the court of appeals. Petitioners have argued that the statute makes objections permissive,

The Solicitor General's brief demonstrates that the decision below creates precisely the risk of "bifurcation of review" that this Court has held should be avoided. *Florida Power & Light*, 470 U.S. at 473. Thus, when a controversy over a pesticide arises, EPA has three options—leaving all the current tolerances in place; reducing or revoking some or all of the current tolerances; and revoking all of the current tolerances. EPA chose the second option and proposed to reduce the section 408 tolerances for Alar on apples from 30 ppb to 20 ppb. Although petitioners filed a citizens' petition urging the agency to revoke all of the tolerances for Alar, EPA decided to amend the regulation as proposed, and therefore it denied the petition. Subsequently, it also revoked several of the section 409 (processed food) tolerances. *See* Petition at 5.

Under the Solicitor General's interpretation of the statute, Uniroyal (Alar's registrant) could have obtained review in the court of appeals of the decision to reduce the section 408 tolerances and the decision to eliminate some of the section 409 tolerances. However, citizens or citizens' groups, such as the petitioners, who seek a ban on Alar, are required to follow two different routes, depending on whether EPA's action was taken under section 408 or section 409. Since the scientific issues pertaining to whether Alar is safe are identical, regardless of whether the tolerance was issued under section 408 or section 409, this bifurcation of review cannot be justified in light of *Florida Power & Light*.

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21 U.S.C. § 346a(d)(5) ("any person adversely affected . . . *may* file objections") (emphasis added), whereas the Solicitor General argues that objections are required. Opposition at 20 n.9. However, not only is the Solicitor General's interpretation refuted by the statutory language, but, as he acknowledges (*id.*), it is at odds with the D.C. Circuit's decision in *National Coalition Against the Misuse of Pesticides v. Thomas*, 809 F.2d 875, 878-80 (1987). It was also rejected by the Ninth Circuit in this case. Pet. App. 16 n.3.

The Solicitor General argues that the district court has exclusive jurisdiction to review EPA's denial of the request to revoke all of Alar's section 408 tolerances (for raw products). He implicitly agrees that petitioners would not be required to file objections to obtain review of a decision regarding section 408 tolerances (Opposition at 15), even though he argues that petitioners must file objections before challenging the denial of their petition to revoke the section 409 tolerances (for processed foods) in the court of appeals. *Id.* at 18. The Solicitor General's position, under which petitioners may bring a direct action in district court (without filing objections) to challenge the denial of a petition to revoke section 408 tolerances, undermines any policy argument that he or the Ninth Circuit has made to justify any requirement for objections under section 409.

2. Even if there were no conflict between the decision below and both *Florida Power & Light* and *Environmental Defense Fund v. HEW*, 428 F.2d 1083 (D.C. Cir. 1970), the substantial confusion with respect to sections 408 and 409 would be sufficient to justify review. The Solicitor General argues that "any suggestion" that an order denying a petition to revoke a tolerance under section 409 is reviewable in district court under the Administrative Procedure Act "would obviously be inconsistent with the procedural scheme established by Section 409." Opposition at 18. However, that is precisely what the D.C. Circuit suggested in *Public Citizen v. Bowen*, 833 F.2d 364, 366 n.1 (1987) ("the proper court for review [of a decision not to revoke a section 409 food additive tolerance] might well be a district court" under the APA). Thus, while the Ninth Circuit has held that review of the denial of a citizens' petition to revoke the section 408 (processed food) tolerances of a pesticide must be sought in the court of appeals after filing objections, the D.C. Circuit has explicitly stated that it is not clear which court has jurisdiction.

The confusion is heightened by the different approach that has been taken by the Food and Drug Administration, which regulates food additives under section 409, the same provision used by EPA to regulate pesticides in processed foods. While agreeing with the Solicitor General that review of decisions not to ban food additives under section 409 must be sought in the court of appeals, the FDA has never taken the position that a citizens' group seeking review of the denial of a petition is first required to file objections. *See* Petition at 11. Moreover, neither the Ninth Circuit nor the Solicitor General has ever identified any legitimate purpose that would be served by requiring the resubmission or reevaluation of the same data and legal arguments that were included in the citizens' petition, in the form of an "objection." Significantly, while both the Ninth Circuit and the D.C. Circuit have held that citizens are *not* required to file objections prior to challenging a section 408 regulation (governing pesticides used on raw products), EPA and the Solicitor General take the position that objections are required. *See* pp. 2-3 n.2, *supra*.

In short, there is substantial confusion as to the proper interpretation of the jurisdictional provisions in sections 408 and 409.

3. Contrary to the Solicitor General's argument, judicial review of agency refusals to ban food additives and pesticides are not rare. Indeed, there have been three reported cases in the last two years. *National Coalition Against the Misuse of Pesticides v. Thomas*, 809 F.2d 875 (D.C. Cir. 1987); *Public Citizen v. Bowen*, 833 F.2d 364 (D.C. Cir. 1987); *Nader v. EPA*, 859 F.2d 747 (9th Cir. 1988). Moreover, under legislation that Congress adopted last session, during the next nine years EPA will have to review the safety of most pesticides on the market, including over 70 pesticides that the agency has already determined may be animal carcinogens. Federal Insecticide, Fungicide, and Rodenticide Act Amendments of 1988, Pub. L. No. 100-532, 102 Stat.

2654 (1988); 53 Fed. Reg. 41,104, 41,119 (October 19, 1988). Once EPA issues the decisions that the new law requires, there are certain to be numerous challenges from consumer organizations and other interested parties.[3] Unless this Court grants this petition and resolves the jurisdictional issues that it raises, litigants and the courts will be required to expend a significant amount of unnecessary energy litigating jurisdictional disputes, which will eventually have to be decided by this Court.

Reaching a final resolution of the jurisdictional issues raised by this case is more important than the result that the Court actually reaches. Unless the Court eliminates the enormous confusion about how the various interested parties — citizens, pesticide manufacturers, growers and others — can obtain judicial review of EPA decisions with respect to pesticides, the delay and cost of such litigation will substantially undermine the right of judicial review conferred by Congress.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[3]As EPA reaches final decisions on these pesticides, there are also likely to be appeals and petitions from growers and other parties. *Cf. Love v. Thomas*, 838 F.2d 1059 (9th Cir. 1988), *cert. petition pending*, No. 88-1255 (challenge by growers to EPA's emergency suspension of dinoseb under the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136d *et seq.*).

Respectfully submitted,

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